1948

Earl W. Wilson and Hartford Accident and Indemnity Company v. The Industrial Commission of Utah, Roberta Barney, and Beverly Barney : Brief of Respondent

Utah Supreme Court

Grover A. Giles; Attorney General; C. N. Ottosen; Assistant Attorney General;

7191

In the Supreme Court

of the State of Utah

EARL W. WILSON, doing business as Wilson's Used Cars and HARTFORD ACCIDENT & INDEMNITY CO., a corporation,

Plaintiffs,

vs.

THE INDUSTRIAL COMMISSION OF UTAH, ROBERTA BARNEY, widow, and BEVERLY BARNEY, minor daughter of Frank Barney, deceased,

Defendants.

Case No.

RESPONDENT'S BRIEF

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STATEMENT OF FACT

The Respondents deem it advisable to amplify the Statement of Facts set out by the Appellants in their brief. The Appellants have called to your attention the basic facts around which this case revolves itself, and repetition thereof is unnecessary herein. But said Appellant's Statement of Facts is incomplete relative to certain important details pertaining to the nature of the

decedent's work and his employment status on the morning of January 9, 1947, at which time he suffered his fatal injuries. The Appellant's Statement of Facts is, therefore, adopted except as is denied, explained or added to in the following. The employment of Frank Barney, the deceased, with Earl W. Wilson, the employer herein, was intermittent (Tr. 7). Barney had not been a regular employee on a monthly salary and his hours of work varied (Tr. 13-27). Barney was used in different capacities, as foreman, mechanic and as a salesman (Tr. 8). He worked at different places because Wilson had shops in Salt Lake, Ogden and Magna, Utah and Phoenix, Arizona (Tr. 8). Barney was allowed to arrange his work as he saw fit (Tr. 25), and Wilson usually gave no specific orders to Barney (Tr. 2, 3), but Barney was supposed to be on the job at 8 A.M. and was to work until 5 P.M. (Tr. 10, 11, 23, 25, 28, 35, 36), leaving Barney to regulate within those hours, his own time and do the work most needed to be done. For about three days prior to the fatal accident, Barney had been working in Magna, getting the Magna shop in operation. But Wilson, in his testimony, again emphasized that Barney was more or less on his own and as far as Wilson knew, the work Barney had been doing at Magna was just setting the shop in order to get it going (Tr. 15). Barney's work was connected with all the other places that Wilson had in operation (Tr. 9, 10, 23, 26, 27, 39).

On the morning of the fatal accident, Barney and a Mr. Reed Allen Foote, left Salt Salt City in Foote's automobile at about 8:00 (Tr. 30) for Magna, Utah.

The fatal accident occurred at about 8:15 A.M. Barney was supposed to be working in Salt Lake City on that day but was being sent to Magna to pick up an automobile. He was then to return to Salt Lake as soon as possible with the automobile and to pick up his work according to his assignment in Salt Lake. Barney wasn't even required or expected to report for work at Magna (Tr. 27, 28, 29) but merely, as stated above, to get the car and then report for work in Salt Lake. As has been pointed out, Wilson usually gave no orders to Barney as to the work he should do (Tr. 23) but on this particular occasion, Wilson had given Barney specific orders to go to Magna for this automobile, as indicated above. Barney had received these orders the night before at Wilson's home, and was fulfilling the specific orders at the time of his fatal injury (Tr. 18, 23, 24). It had been planned and was the usual custom that Barney was to take or would have taken his employer's wrecker to Magna to pick up this automobile, but the wrecker was out of repair on this particular day; therefore, Barney was left to seek his own transportation to Magna. He rode to Magna with Mr. Foote, who is a mechanic, regularly assigned to that shop (Tr. 9, 10).

ARGUMENT

The sole question before this court is whether or not Frank Barney, the deceased, sustained an injury arising out of or in the course of his employment with Earl W. Wilson on the 9th day of January, 1947. The Appellants have very thoroughly discussed the general rule relative to this matter, namely, that an injury sustained by

an employee, while going to or returning from work, generally does not arise out of or in the course of his employment and that no compensation can be paid therefor. Respondents concede that this is the general rule and that it is very thoroughly supported by the authorities. The Appellants further, in their brief, point out the exceptions to this rule and attempt to show that the case before the court does not come under any of these so-called exceptions. The Respondents respectfully submit that the case now before the court does come, and is very definitely to be identified with the exception to the general rule, known as the special mission or special errand doctrine.

May we briefly review the facts. Barney, as well as all other employees of Wilson, were "supposed to be on the job" from 8:00 in the morning to 5:00 in the evening. Barney's fatal accident occurred on company time. Barney ordinarily had no special assignments but was left to his own good judgment as to where he was needed the most, and on the day in question he was supposed to be working in the Salt Lake City shop but, as the evidence shows, he did not report at the Salt Lake shop for the simple reason that he was sent on a special errand as a preliminary to the work he was supposed to do in Salt Lake City. It is especially noteworthy that at this particular time, Barney was not just doing regular or routine work but was under specific orders, and that had he not been sent on, and had he not been required to do, this particular errand, he would have been in the Salt Lake City Shop. Barney was fulfilling this mission according

to his orders. He commenced this errand at the beginning of his working day and was injured after this errand had been started.

Barney received his orders the night before, but this certainly does not make, nor could it make, the slightest difference in Barney's employment status. The question of whether or not an employee is on a special errand has no material connection with when the orders might have been given, especially if the orders are being properly fulfilled as to time and manner. It is also noteworthy to point out that if the wrecker had been in repair, Barney would have been using company equipment on company time. It was a mere coincidence that the wrecker was not being used by Barney that morning. It is also important to note that Wilson had not provided any special means of transportation and that by not doing so, he certainly sanctioned and approved whatever means of transportation Barney might select or find available. Certainly the intention of the employer, as to the employment status Barney should occupy that morning and the fact that he should be and was sent on a special errand, is not changed by the fact that the wrecker was out of repair. Barney's work that had been regular or routine (if such a label can be attached to the work he was doing) had been for the last three days prior to the accident, to get the Magna shop in operation. This work was now at an end. On the day of the injury, Barney was not doing this work at Magna, but had been given a new assignment and was on a special trip to perform a special function which had been ordered by his employer. Barney wasn't even

supposed to report to work at Magna that morning, which statement was made by the employer, and certainly emphasizes the fact of a special errand assigned to Barney. Had this accident occurred off company hours and had Barney been merely on his way to do regular work, he no doubt would have been in a much different situation. But we do not have, in this case, those circumstances to contend with. Barney was on company time, under special orders; his movements were under the control and jurisdiction of Wilson and Barney's primary, if not exclusive purpose in being on the road to Magna, was to fulfill this particular mission or errand.

The leading case in Utah in which our Supreme Court has made a ruling on the special mission or special errand doctrine is the case of Kahn Brothers Co. vs. Industrial Commission, 75 Utah 145, 283 Pac. 1054. On page 147 of the Utah Reports, our Supreme Court states as follows:

> It is a general rule that injuries sustained while an employee is traveling to and from his place of employment are not compensable. An exception to this rule, however, is where an employee, either on his employer's or his own time, is upon some substantial mission for the employer growing out of his employment. In such cases the employee is within the provision of the act. The mission for the employer must be the major factor in the journey or movement and not merely incidental thereto. The precise question for decision therefore is, was applicant in the course of execution of an errand or special mission on behalf of the employer at the time he suffered the accident. If he was the award must be sustained."

In the Kahn case the applicant was a bookkeeper and frequently did uptown business for his employer. He also frequently went home for lunch and did assigned work for his employer, sometime on his way home and sometime while returning from lunch. The injury in question in that case occurred while he was returning from lunch and was on his way to the post office on an errand for his employer.

This special mission theory is also discussed in another Utah case, namely, The Vitagraph Inc. vs. The Industrial Commission, 96 Utah 190, 85 Pac. (2d) 601. Our court's statement relative to this theory is quoted by the Appellants on page 14 of their brief, which we hereby incorporate and to which we refer the court.

Our Utah Court further passed upon this theory in the case of Chandler vs. Industrial Commission, 60 Utah 387, 208 Pac. 499. In that case the decedent was a delivery boy. His hours of labor were from 7:00 in the morning until 6:00 in the evening. On the morning of his injury he had left home to go directly to the garage of his employer to get the delivery truck. This was part of his assigned duties. On his way to the garage, slightly after 7:00 A.M., he was injured so that death resulted. In that case our Supreme Court stated as follows:

> " . . . If instead of going directly to the garage, Chandler had gone to his employer's place of business, and, upon his arrival there, had been ordered to go to the garage for the purpose of obtaining his delivery car and for the purpose of supervising the preparation of the other cars for their drivers, the case would clearly come within

> one of the well-recognized exceptions to the general rule that an employee injured while on his way to work and before he has received his place of work does not come under the protection of the Compensation Act. He took the direct route to the garage during working hours, and, at the very time he was bitten by the dog, he was engaged in the furtherance of his employer's business and not on an errand of his own. He was obeying the order of his employer, the order to proceed to the garage for the purpose of attending to his duties there. He was under the control and direction of his employer from the moment he left home to go to the garage for the automobile, and was at that time in the course of, and within the scope of, his employment. His death resulting from the accident is therefore compensable."

Another leading case frequently referred to, is the case of London Guaranty & Accident Co. vs. Industrial Accident Commission, (Calif.) 213 Pac. 977. In that case the California Supreme Court referred to the exception now being discussed, in the following terms:

> ". . . Exceptions to the general rule are cases where an employee, either in his employer's or his own time, is going to or from his place of employment on some substantial mission for his employer growing out of his employment. In such cases it is held that the employee is within the protection of the act. But the mission must be the major factor in the journey or movement, and not merely incidental thereto; that is to say, if incidental to the main purpose of going to or from the place of employment, it would not bring such person under the protection of the act. If, on the other hand, the main purpose of going or coming was to

> perform some act arising out of his employment, he would be under the protection of the act, although incident to the performance of such duty, he might be going or coming from his home."

The above rule from the California case has frequently been used to assist in determining whether or not a person is in the course of his employment at the time of injury. As this rule from the California court may be applied to the case before the court, we desire to point out that Barney, the deceased, was on a "substantial mission" for his employer. The particular assignment or mission of Barney was the "major factor" of his going to Magna. Barney was going to Magna for no other purpose than to perform that one errand. This assigned errand was not incidental to his employment at that time, but was the exclusive reason for the trip.

We desire further to call this court's attention to the case of Massey vs. Board of Education (N.C.) 167 S.E. 695. In that case the employee was a janitor. He was injured on his way to work and was crossing the street to buy the cleaning materials which he had been instructed to purchase before he came to work. The North Carolina Supreme Court in that case stated as follows:

> ". . . While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere. Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his

> return. Any agreement to that effect may be either express or be shown by the course of business. In such case the hazards of the journey may properly be regarded as hazards of the service and hence within the purview of the Compensation Act."

Another decision which is followed by the North Carolina case, just referred to, is the case of Kyle vs. Green High School (Iowa) 226 N.W. 71. This case has an interesting accumulation of authorities in the type of case now before the court.

The Respondents further refer to the case of In Re Raynes (Indiana) 118 N.E. 387. In that case the employee was a secretary and treasurer of a corporation and in his routine and regular work went to various cities and towns to collect money. In this particular case, he had been sent to Terre Haute to make collections. Only a small part of his day was devoted to this activity. In fact, he stayed until late at night and indulged in various personal activities. He missed his regular train and hired a taxicab to take him home. He was injured while on his way home, after alighting from the taxicab when it stopped for gas. In that case on page 389, the Supreme Court of Indiana stated as follows:

> "Raynes went to Terre Haute for the purpost of collecting accounts due the company. This statement is an ultimate fact. If to collect such accounts were his exclusive purpose, then in going to Terre Haute he was discharging the duties of his employment. Perhaps the same conclusion would follow if such was his principal purpose."

See also In Re Harraden, 118 N.E. 142.

There are numerous other cases which deal with this particular theory pertaining to special missions and special errands, many of which deal with one or more of the issues and involve, in many respects, facts similar to those, involved in the case before the court.

We respectfully recommend reading the following cases: Altman vs. Kaufman Realty Co. (Pa.) 167 Atl. 394; Redner vs. H. C. Faber and Sons (N.Y.) 119 N.E. 842; City of Milwaukee vs. Althoff (Wis.) 145 N.W. 238; Trader General Insurance Co. vs. Nunley (Texas) 80 S.W. (2) 383; Industrial Commission vs. Ætna Life Insurance Co., (Colo.) 174 Pac. 589; and Reese vs. National Surety Co., (Minn.) 203 N.W. 442.

The Respondents feel that there is no conflict in the evidence that points to the deceased, Mr. Barney, having been sent on a special errand, and therefore being in the course of his employment when injured. On the contrary there is considerable evidence, relating to Mr. Barney's activities for, and prior to, the fatal day, pointing to an assignment of Barney by his employer to an exclusive mission to get the automobile at Magna and to bring it to Salt Lake City. We submit that the Commission is the fact finding body, is the arbiter of the facts, and that they made no error in ruling that Barney was in the course of his employment at the time of his fatal injury. We submit that the decision should stand because of the sufficiency of the evidence as above indicated, supporting the Commission's finding. We, therefore, urge that

the Commission's award in the case before the court be affirmed.

Respectfully submitted,

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